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Reply Br. of Taggart
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 202.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

Brief of Appellant in Reply.

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
Of Counsel.

C. O. Burgoyne, Walker and Centre Streets, New York.

IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

AGAINST

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

The brief for appellee which has come to hand calls for a suggestion respecting the questions open for consideration in this court upon this appeal, and as to the jurisdiction of this court of the questions decided by the Circuit Court of Appeals.

In the brief of the appellee the point is sought to be made that only questions arising upon the Act of Congress of July 24, 1866, is open for this court to consider, and the cases of Horner vs. U. S., 43 U. S., and Stevens vs. Cherokee Nation, 174 U. S., are cited in support of a contention that this court has only jurisdiction to review the Federal questions involved in this case.

It is to be noticed that while this cause could only be removed under the peculiar provisions of the removal

act on the ground of the Federal question involved, because the defendant was a citizen of the State of Michigan, and was sued in that State, yet the cause could have been brought originally in the Federal court of that district and jurisdiction sustained upon two grounds; viz., first, that of diverse citizenship, and, second, that there was involved in the controversy a question arising under the laws of the United States.

This was not done, but the cause was taken into the Federal court, as we have already stated, by reason of the fact that this suit was one arising under the constitution and laws of the United States, and especially under the Act of Congress of July 24th, 1866, now contained in Section 5263 of the Revised Statutes of the United States (Record, p. 12). The cause was tried there and all the questions in it decided by that court. It was retried upon appeal in the United States Circuit Court of Appeals, and from the decision of the United States Circuit Court of Appeals was appealed to this court, and the proposition on the part of the appellee is now urged, that only the Federal question is brought into this court for consideration.

This, we submit, is wholly erroneous. Under Sections 690, 691 and 692, as they existed prior to the passage of the Court of Appeals Act, an appeal would have been from the Circuit Court to this court, and every question in the case would be re-examined by this court upon the appeal.

The limitation that in the examination of a final judgment or decree rendered in any suit in the highest court of the State to the Federal question involved alone shall be considered is clearly required by the provisions of Section 709; and the reasons therefor are stated in the opinion of Mr. Justice MILLER in Murdock vs. City

of Memphis (20 Wallace, 590); but no such limitation applied to a case coming into this court by appeal from the Circuit Court, under the sections above cited whether the jurisdiction of the Circuit Court depended upon diverse citizenship or upon the fact that the case arose under the laws and constitution of the United States.

In this state of the law the Act establishing the Circuit Court of Appeals was passed March 3, 1891 (Sts. at Large, vol. 26, p. 826). Section 5 of that Act defines the cases in which appeal or writ of error may be taken direct from the District Court or Circuit Court to this court. In Section 6, the appellate jurisdiction of the Circuit Court of Appeals is defined, and the cases in which their judgments are made final are then defined:

"And the judgments or decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens, and citizens of the United States or citizens of different States."

It is further provided that:

"In all cases not hereinbefore in this section made final there shall be a right of appeal from, or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs."

This makes perfectly clear the fact that the decree of the Circuit Court of Appeals is only final in the case in which its jurisdiction is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States, and that the right of appeal referred to in the subsequent part of the section is a right of appeal unaffected by the previous part of the Section making the decree final in certain other contingencies.

The language of the Act would seem not to bear any other construction. The Circuit Court of Appeals may at any time certify to the Supreme Court of the United States any questions or propositions of law, and when so done the Supreme Court may give its instructions on the questions certified to it, or may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. It is also competent in any case to require by *certiorari* any such case to be certified to the Supreme Court, in which case it has the same power to review by appeal or writ of error to the Supreme Court. In each of these cases this court would re-examine the whole case as upon appeal. In face of these clear and explicit provisions of the Court of Appeals Act, we respectfully submit that no supposed analogy between the limitation contained in the statute referred to in Stevens vs. Cherokee Nation, cited *ante*, can control the clear language of this act, under which this appeal was taken. All the questions in this case were passed upon in the Circuit Court and in the Circuit Court of Appeals; all are brought to this court for decision by the appeal which was expressly reserved to the parties as a matter of right in the Court of Appeals Act of March 3, 1891. This act expressly reserved to the parties a right to a "review of the case," not of the federal questions in the case.

There is a suggestion in the brief of the Appellee that we are limited by our appeal to the question of specific performance of the contract, and that the questions which we ask this court to decide under the Act of 1866 do not arise in the case. We submit that this is too

narrow a view to take of the bill. The bill was drafted under the liberal provisions of the Michigan statute respecting bills in chancery, and is not as full as it would be required to be if originally filed in the Circuit Court of the United States. The seventh paragraph of the bill very clearly avers the right on the part of the telegraph company to maintain the telegraph line along this railroad under the provisions of the statute of the United States. The prayer of the bill is for the right to reconnect its wires to its main line and use said wires, and that the defendant be required to carry out the contract in good faith. In addition, there is a general prayer for other, different and further relief or both as may be agreeable to equity, and under this general prayer and the averment in paragraph 7 we insist that the question is properly and legitimately before the court. At any rate, no question was made in the Circuit Court of Appeals that this question was not properly presented in the case, and the Circuit Court of Appeals decided the question, not upon the technical ground that no such question was made in the case, but that being properly before it on the record the powers of a court of equity were so circumscribed that the relief which the complainant insisted it was entitled to could not be granted by the court (Opinion of TAFT, Record, pp. 43 and 44).

Respectfully submitted,

RUSH TAGGART,
Solicitor for Appellant.

JOHN F. DILLON,
Of Counsel.